



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-99-1

FACTS:

You are a former full-time employee of state agency XYZ and have been considering employment in the private sector.^{1/} In 1997, while still an XYZ employee, you were asked to serve on the Procurement Management Team ("PMT") which evaluated potential vendors responding to the Executive Office for Administration and Finance's ("EOAF") Operational Services Division ("OSD") Request for Responses for Services ("RFR").^{2/}

OSD created the RFR.^{3/} The RFR, covering over 55 pages (including attachments), describes the terms and conditions for submitting a bid, bidder instructions, technical/business specifications, bidder history and references, and sample configurations for providing services. The RFR states in its first paragraph, "The purpose of this Procurement is to establish a Statewide Contract for . . . Services The intent of the Statewide Contract is to provide a vehicle to allow state agencies, authorities, cities and towns and Eligible Entities to purchase . . . services and associated hardware . . . that meet their specific and unique needs in a consistent, cost effective and coordinated manner." This type of contract is commonly known as a blanket contract. For purposes of this opinion, we will refer to the Statewide Contract as the Blanket Contract.

The Blanket Contract is made up of several parts: (1) the RFR; (2) the responses from the selected vendors ("Vendor Responses"); (3) the "Commonwealth Terms and Conditions" ("Standard Terms and Conditions"); and (4) the "Commonwealth of Massachusetts Standard Contract Form" ("Standard Form"). All four parts are interdependent. When a state agency, for example, selects a vendor from the list of qualified vendors that appear in the Blanket Contract, the agency and the vendor execute the Standard Form. The Standard Form covers the specific work the agency requires, but the Form alone does not represent the complete contractual relationship between the vendor and the state. By the time an agency selects a vendor from the Blanket Contract, the vendor has already agreed to the terms and conditions set forth in the RFR and the Standard Terms and Conditions. Similarly, the state has already evaluated and relied upon the representations and warranties required in the RFR and those in the Vendor Responses. The RFR expressly incorporates by reference the terms of 801 CMR § 21.00, the regulation governing state agency procurement of commodities or services ("Regulation").^{4/} Pursuant to the Regulation, the Standard Form incorporates by reference the Standard Terms and Conditions, the RFR and the Vendor Responses. See 801 CMR §§ 21.02(2), 21.07(2)(b) and (c).^{5/} The parties with whom we discussed the blanket contracting process all agree that although a public agency uses only the Standard Form when it engages a vendor under the Blanket Contract, the Standard Form does not represent the entire contractual relationship between the vendor and the state.^{6/} (emphasis in the original).

Because vendors have been selected through the RFR process and entered into the Blanket Contract, the public agency and the vendor it selects do not need to negotiate the major terms, conditions, representations or warranties that appear in the RFR, Standard Terms and Conditions, or the Vendor Responses.^{7/} The goal of the blanket contracting process is to simplify contracting for public agencies. Each agency may select services from an approved

vendor without having to conduct its own bidding process to assess a vendor's qualifications and to negotiate general terms, conditions, warranties or representations that appear elsewhere in the Blanket Contract. Instead, each agency, having selected a vendor from the group approved under the Blanket Contract, uses the Standard Form, a one-page document, and adds to the Standard Form specific requirements for the services it seeks.

OSD published the Blanket Contract and its components on the internet as an Update. The Update describes the Blanket Contract for the benefit of the public agencies that require such services. Among other things, the terms of the Blanket Contract include the contract's duration, quoting and pricing characteristics, testing procedures, providing drawings, required warranties, response and repair times, and performance guarantee.^{9/} The Update advises that due to the complex and constantly evolving nature of the services, "the Procurement Management Team ("PMT") recommends that before deciding on any Services, the user solicit three estimates from contractors on this Statewide Contract. There are ceiling prices in this Contract and users are encouraged to negotiate downward on all quotes to obtain best value." You and five other individuals, along with each individual's e-mail address, are listed on the PMT.

After OSD created the RFR, it selected state employees to serve on the PMT. A PMT is generally a standing body that exists throughout the duration of the Blanket Contract. The PMT not only selects qualified vendors but also helps to ensure that the state is receiving the services the Blanket Contract covers. You had no role in creating the RFR. Your responsibilities within XYZ did *not* include the approval or purchase of the particular equipment and services. You were selected, however, because of your specific expertise in the subject matter. Other PMT members had expertise in other areas, such as business evaluation. When OSD issues a Request for Responses, it often selects experts from other agencies to be part of evaluation teams when its staff does not have the necessary expertise.

Your team evaluated each bidder's response to the RFR against the criteria set forth therein. According to the RFR, the PMT performed the following functions. It evaluated bidders' responses by assigning points to the technical responses. Points were awarded for desirable specifications outlined in the evaluation criteria. Each bidder submitted its history and references which the PMT reviewed to ensure that the bidder's history, financial stability and experience met the RFR's specifications. Again, points were assigned to these criteria. The PMT also contacted the bidders' references to confirm the bidders' ability to perform and the accuracy of the statements within the bidders' responses. Finally, the PMT visited one of the customer references the bidders provided to evaluate the customer's input on design, installation, project management, quality and overall satisfaction. After reviewing the technical responses, references, and the PMT visit, the PMT team leader released the cost responses to the PMT, which, in turn, reviewed those responses and assigned points based on a cost evaluation formula. Total points were the sum of the points awarded for technical response, references, customer visit, cost response and points for any minority business enterprise participation.^{9/}

Following this process, you and your fellow PMT members selected ten qualified vendors. After completing the selection process, you report that you had no further role as a PMT member.

One of the vendors which you and the other PMT members selected and that entered into the Blanket Contract, ABC Corporation, has discussed the possibility of hiring you. If you were to accept ABC's offer, you would resign from state employment. ABC would like you to represent it in sales of its services to agencies of the Commonwealth under, among other

things, the Blanket Contract.^{10/} You have also discussed the possibility of performing marketing for ABC, which has been an approved Commonwealth vendor for over eight years.

QUESTION:

If you were to become a former state employee, would G. L. c. 268A, § 5(a) prohibit you from receiving compensation from, or acting as agent for, ABC to sell or market its services under the Blanket Contract to individual public agencies where you participated as a state employee in reviewing the RFR and selecting the qualified vendors, including ABC?^{11/}

ANSWER:

G. L. c. 268A, § 5(a) would prohibit you from being compensated by, or acting as agent for, ABC in selling or marketing its services under the Blanket Contract to individual public agencies because ABC's contractual relationship with individual agencies is part of the same particular matter (the Blanket Contract) in which you participated as a member of the Procurement Management Team that helped to select ABC.

DISCUSSION:

As an employee of XYZ, you were a state employee^{12/} subject to the conflict of interest law. If you leave state employment in order to work as a private employee of ABC, you will become a former state employee for purposes of the conflict of interest law.^{13/}

Section 5(a) of G. L. c. 268A provides that a former state employee may not "act as agent or attorney for," or receive "compensation directly or indirectly from anyone other than the commonwealth or a state agency, in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest *and in which he participated* as a state employee while so employed." (emphasis added).

This Commission has commented that

Section 5 is grounded on several policy considerations. The undivided loyalty due from a state employee while serving is deemed to continue with respect to some matters after he leaves state service. Moreover, § 5 precludes a state employee from making official judgments with an eye, wittingly or unwittingly, consciously or subconsciously, toward his own personal future interest. Finally, the law ensures that former employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others.

In re Wharton, 1984 SEC 182, 185; *see also EC-COI-92-17; EC-COI-98-3.*

The statutory purpose of § 5 "is to bar . . . former employees, *not* from benefitting from the general subject-matter expertise they acquired in government service, but from selling to private interests their familiarity with the facts of particular matters that are of *continuing concern* to their former government employer." *EC-COI-92-17* (emphasis added); *see also EC-COI-93-16; EC-COI-95-11.*

First, we must identify the "particular matter(s)" in issue. The term "particular matter" is defined as "any judicial or other proceeding, application, submission, request for a ruling or

other determination, contract, claim, controversy, . . . decision, determination, [or] finding . . .” G. L. c. 268A, § 1(k). According to this definition, the Blanket Contract is a particular matter. You do not disagree. Instead, you argue that the Standard Form contract that ABC and a state agency would enter into, because the agency had chosen ABC from the Blanket Contract list of qualified vendors, would be sufficiently distinct from the RFR process in which you participated as a member of the PMT to constitute a different particular matter.^{14/} You argue that you would be paid by ABC to sell its services pursuant only to the Standard Form contract between it and the state agency. You assert that your being paid to sell ABC’s services to a specific state agency would not violate § 5(a) because your private compensation would be sufficiently unrelated to your selecting ABC as one of ten qualified vendors. In effect, you argue that your private work for ABC would be in connection with a particular matter in which you did not participate and for which you did not have official responsibility as a member of the PMT and as a state employee.

Considering the purpose of § 5, your argument perhaps might be persuasive if ABC’s contractual relationship were with *only* the public agency that selects it from the Blanket Contract list and only the Standard Form memorialized such a relationship. For the following reasons, however, we conclude that the Blanket Contract and the Standard Form used for a public agency’s specific work constitute a single contract and agreement, thus the same particular matter under § 5.

The Standard Form and the contractual relationship it memorializes do not exist, as a matter of fact and law^{15/} separately and apart from the Blanket Contract. Although the Standard Form describes the specific work to be performed, as negotiated between the vendor and the agency that selects it, the Standard Form relies upon the other components of the Blanket Contract for most of the terms, conditions, warranties and representations that are part of the vendor’s contract for services. The Standard Form alone does not contain all of the essential terms of the contractual relationship between a vendor and an agency. The entire agreement between the vendor and the agency can be ascertained only by reading together the Standard Form and the other parts of the Blanket Contract. In selling or marketing ABC’s services as a qualified vendor under the Blanket Contract, you would be compensated by ABC, or acting as its agent, in connection with not only the specific agreement between ABC and a given agency but also the other parts of the Blanket Contract because neither the other parts nor the specific agreement under the Standard Form alone constitute the entire contract. The parties to the Blanket Contract, including the Standard Form, include not only ABC and the specific agency that selects it but also the Commonwealth, through OSD. Thus, we cannot differentiate the Standard Form as being a particular matter distinct from the Blanket Contract.

We note that you do not dispute having “participated” in the process of selecting qualified vendors for purposes of the conflict law. “Participate” is defined, in relevant part, as participating “in agency action or in a particular matter personally and substantially as a state . . . employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.” G. L. c. 268A, § 1(j). Here, you provided your technical expertise to evaluate the bidders’ responses to such technical aspects of the RFR. See e.g., *EC-COI-79-74* (state employee whose expert opinion had been sought on factors that were central considerations in the final evaluation of the contract deemed to have participated in the contract even though he claimed to have no role in selecting the ultimate contractor or in the final review, approval or execution of the contract). See also *EC-COI-98-3* and cases and opinions cited therein.

In *EC-COI-93-16*, we concluded that a former state employee who had participated in creating a request for proposals (RFP) could not receive compensation from a private entity in connection with the contracts his former state agency awarded to that same entity pursuant to the RFP. As we noted in *EC-COI-93-16*, “although in two early Commission opinions we concluded that ‘participation in the development of an RFP is not, in and of itself, substantial “participation” ... in the award of the contract,’ (*EC-COI-79-51*; see also *79-85*), we have subsequently made it clear that the proper focus is on the degree of participation in the contracting process, rather than on the stage of the process in which the participation occurs.” Here, you participated, personally and substantially, in awarding the Blanket Contract by helping to select the qualified vendors. Contrast *EC-COI-82-82* (former state employee not barred under § 5(a) when he had no role in formulating RFP, he attended informational meetings that were not part of selection process, and he dissociated himself from any participation in the selection process). We, therefore, conclude that your compensation for selling or marketing ABC’s services as a qualified vendor under the Blanket Contract to individual agencies, would be in connection with the same particular matter in which you participated as a state employee.

Finally, the fact that, on behalf of the Commonwealth, you reviewed and evaluated the technical qualifications of each of the successful bidders while helping to select them for the Blanket Contract, but now want to help ABC compete against the same bidders for the same work under the Blanket Contract, is contrary to § 5’s policy against making official judgments, intentionally or unintentionally, towards one’s personal future interests and deriving unfair advantage for oneself or others.^{16/}

DATE AUTHORIZED: January 13, 1999

^{1/}You no longer work for XYZ and are currently employed at UVW state agency.

^{2/}At your request, we discussed with various officials at OSD the Commonwealth’s contracting process and the role of a PMT. OSD has expressed interest in your request and our response because our guidance will apply to other state employees who agree to serve on PMT’s.

^{3/}[Deleted]

^{4/}Although the RFR alone does not constitute a contract, it contains numerous conditions with which vendors must comply in order to do business with public agencies within the Commonwealth. For example, Section 4.1.6 of the RFR states:

Upon request from a Commonwealth agency or eligible entity, the Bidder, now Contractor, will provide a **written quote** for Telecommunications/Data Cabling Services. The Bidder **must** quote **all costs** associated with providing an agency . . . Services based on their particular needs. The Bidder **must** provide quotes to agencies that include all items . . . Oversight errors on the part of the Bidder when providing a quote will result in correction by the Bidder at no cost to the agency. (emphasis in the original)

^{5/}The following language is included in the Standard Form: “[T]he Contractor certifies . . . that it has submitted a Response to a Request for Response (RFR) issued by the Department and that this Response is the Contractor’s offer as evidenced by the execution below of the Contractor’s authorized signatory, and that this Response may be subject to negotiation by the Department, and that the terms of the RFR, the Contractor’s Response and any negotiated terms of the Response shall be deemed accepted by the Department and included as part of this Contract, which incorporates by reference the Commonwealth Terms and Conditions, . . .”

^{6/}Vendors are made aware of this in the documentation OSD provides. For example, the RFR states:

By executing the **Standard Contract Form**, the Contract [sic] certifies under the pains and penalties of perjury that it has submitted a Response to a Request for Response (RFR) issued by the Procurement Management Team and that this Response is the Contractor's offer as evidenced by the execution by the Contractor's authorized signatory, that the Contractor's Response may be subject to negotiation by the Procurement Management Team, and that the terms **shall** be deemed accepted by the Procurement Management Team and included as part of the Contract upon execution **of the Standard Contract Form** by the Procurement Management Team's authorized signatory. (emphasis in the original)

^{7/}Pursuant to 801 CMR § 21.07 (1)(a), the RFR and the Vendor Responses determine what elements of performance or cost may be negotiated between the vendor and the agency that selects it. If an RFR is silent as to what can be negotiated, the vendor and the agency may negotiate on the details of performance identified within the scope of the original RFR and the response, and may not increase or change the scope of performance or costs.

^{8/} [Deleted]

^{9/} [Deleted]

^{10/} [Deleted]

^{11/}We note that you requested and received an informal opinion letter from the Legal Division that covered this question and other conflict of interest issues that these facts raise. Following receipt of that letter, you requested that we conduct a formal review of these facts, focusing only on this question concerning your potential private employment. We note that this opinion is limited to an analysis of your involvement in the Blanket Contract and does not apply to other state contracts or other particular matters.

^{12/}"State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. . . . " G.L. c. 268A, § 1(q).

^{13/}Although you are currently a former XYZ employee for purposes of § 5, the fact that you are also a current state employee, as an employee of UVW, for purposes of other provisions of the conflict law, makes you subject to § 4 of G. L. c. 268A. Section 4 prohibits you from being paid by, or acting as agent for, ABC in relation to *any* particular matter of direct and substantial interest to the Commonwealth or to which the Commonwealth or a state agency is a party.

^{14/}See discussion below concerning participation.

^{15/} See 801 CMR § 21.07 (2)(b) and (c). To determine when instruments deriving from a given transaction should be read together, case law considers the simultaneity of execution, identity of subject matter and parties, cross-referencing, and interdependency of provisions. *Chelsea Industries, Inc. v. Florence*, 358 Mass. 50, 55-56 (1970); *Gilmore v. Century Bank & Trust Co.*, 20 Mass. App. Ct. 49, 56 (1985).

^{16/}G. L. c. 268A, § 23(c)(1) also prohibits a former state employee from accepting "employment or engag[ing] in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority."